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John Watson Chevrolet v. Buick Motors Division, General Motors Corporation : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

JOHN WATSON CHEVROLET, Plaintiff/Appellant, vs. BUICK MOTORS DIVISION, GENERAL MOTORS CORPORATION, Defendant/Appellee.	**REPLY BRIEF OF APPELLANT** Appellate Court No. 20000351-CA Priority No. 15

REPLY BRIEF OF APPELLANT

APPEAL FROM THE SECOND DISTRICT
WEBER COUNTY
JUDGE STANTON M. TAYLOR

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ARGUMENT

I. PRINCIPLES OF EQUITABLE ESTOPPEL HAVE A LEGAL AND FACTUAL BASIS.

Defendant, Buick Motors Division, General Motors Corporation, (hereinafter "Buick") addresses only the facts and legal arguments involving the specific principle of promissory estoppel and fails to even address equitable estoppel. Plaintiff has conceded that no promises were made to him that he would be awarded the Buick franchise in Ogden, Utah by Buick Division personnel. By failing to address the principles of equitable estoppel in its brief, Buick is apparently conceding that its conduct led another party, John Watson Chevrolet (hereinafter "Watson"), to rely on the conduct to his detriment which will result in damages if Buick is allowed to get away with its conduct.

Contrary to the implication of the defendant, there is no requirement in the principle of equitable estoppel for the parties to have a contract. Much of this dispute is a case of first impression for the court. The plaintiff cited the Restatement of Contracts for purposes of borrowing the logic from the restatement, not to in any way intimate that a contract was necessary between the parties.

Defendant correctly cites *Larson v. Wycoff Co.*, 624 P.2d 1151 (Utah 1981) but misused the concept. It is correct that the claiming party cannot rely on representations or acts if they are contrary to his own knowledge of the truth. Defendant would have the court believe that because John Watson knew that he was not guaranteed to be the appointed dealer in Ogden it was the only "truth" upon which he could count. Buick fails to consider that it is also a truth that Buick did not exercise its right of first refusal on the Warner/Norda contract. It is also a truth that the defendant waived implementation of the all too nebulas Project 2000 requirements and it is a truth that the Buick violated its own policy by contacting another dealer behind plaintiff's back, while enjoying the fruits of John Watson's unique ability to get the Whetton TRO dismissed. John Watson did not fully discover the "truth" of what Buick had done to manipulate him and the Ogden market until depositions were completed.

II. IT IS APPARENT THAT BUICK INTERFERED WITH THE BUY/SELL AGREEMENT BETWEEN HELSO AND WATSON WITHOUT PROPER JUSTIFICATION.

The reversal of the lower court decision by the Third Circuit Court of Appeals in

Crivilli v. General Motor Corp. 215 F.3d 386 (3d Cir 2000) is not pivotal to John Watson's argument before this court. The well-reasoned opinion of the trial court in *Crivilli* supported the legal principles germane to this action. While the reversal of the trial court takes away relevant legal support it does not diminish the legal principles established by the Utah courts in *Leigh Furniture & Carpet Co. v. Isom,* 657 P.2d 293 (Utah 1982) because the uncontroverted facts show improper means coupled with improper purpose unknown to the Third Circuit because of its reliance on the Restatement 2d of Torts specifically rejected by *Leigh Furniture* and its progeny.

In *Leigh Furniture and Carpet Company vs. Isom*, 657 P.2d 293 (Utah 1982). The Court said at page 304:

> We recognize a common law cause of action for intentional interference with prospective economic relations and adopt the Oregon definition of this tort. Under this definition, in order to recover damages, the plaintiff must prove (1) that the defendant intentionally interfered with plaintiff's existing or potential economic relations, (2) for an improper purpose or by improper means, (3) causing injury to the plaintiff. Privilege is an affirmative defense, *Searle v. Johnson*, Utah 646 P.2d 683 (1982), which does not become an issue unless "the acts charged would be tortuous on the part of an unprivileged defendant." *Top Service Body Shop, Inc.*, 283 Or. At 210, 582 P.2d at 1371.

Even a casual reading of the Garove Deposition will show that GM schooled its dealers and made known to all applicants for dealerships its long standing policy that an application for a dealership would be evaluated on its merits and not in comparison with other prospective dealers. Under Buick's well-known policy, on which John

Watson relied as a former Buick dealer, no other applications could be considered or even accepted until Watson was notified of Buick's decision on his application. The quote from *St. Benedict's Co. v. St. Benedicts Hospital*, 811 P.2nd 194 (Utah 1991) relied upon by defendant on page 14 of its Brief conveniently leaves out the additional basis for improper means identified initially in *Top Service Body Shop, Inc.*, and confirmed in *Leigh Furniture*, 657 P. 2d at 308, and subsequently stated in *St. Benedicts*, 811 P. 2d at 201, where the means may be improper because they violate "an established standard of a trade or profession." With the Watson application pending, Buick went shopping for a dealer it considered more suitable without ever telling Watson why he was not as acceptable as Rick Warner and Ray Norda.

The Third Circuit Court's opinion speculates as to the Pennsylvania legislature's use of the "reasonable" standard in the Pennsylvania Act, and concludes that it applies only to the contract between GM and its dealers. After reciting in detail the history of franchise contracts and the need for protecting the franchisee from arbitrary acts of the franchisor, the Third Circuit failed to recognize that the franchisee is already protected by the requirement that the franchisor purchase the franchise if there is no other buyer under Section 12 of the Dealer Sales and Service Agreement. Therefore, the use of the "reasonable" standard has little to do with the franchisee because the franchisee will get paid for the franchise either way. The requirement of a "reasonable" standard can then only apply to the purchaser from the franchisee to keep the franchisor from

unreasonably interfering with the contract for sale. The reasonableness standard of the statute therefore specifically applies to prospective buyers because it is a non-sequitur to apply it to existing dealers.

The Third Circuit was superficial in its view that the right of first refusal created two (2) purchasers for every offer received by the owner. It is a fallacy to conclude that a right of first refusal creates an open market out of which the dealer can choose the best offer. There is only one deal on the table and the franchisee has just lost the control of his voluntary sale to the individual of his choosing in favor of the total control of Buick Division.

The Third Circuit attempts to create an invisible boundary between the right of first refusal and an unreasonably withheld consent arguing that the exercise of the right of first refusal is separate and distinct and can be acted upon independently from withholding its consent. However, the right of first refusal cannot always be used so independently. Buick's use of its right of first refusal as a tool to withhold its consent for the sale to John Watson became unreasonable when it brokered the Watson purchase contract to a dealer who had made no application while the Watson application was pending and in violation of its own policy.

The defendant's right of first refusal as an independent contract right had been essentially emasculated by the circumstances in this case. Buick was selling no automobiles in Ogden, Utah because Jim Whetten had an injunction against the transfer

of assets except though the regular course of business, but Helsco had closed its doors. Buick could not even proceed on its termination notice, initially because of the TRO and then due to the eminent bankruptcy of Helsco. In order to sell Buicks in Ogden, Utah defendant created an expectation that would induce John Watson to negotiate for the purchase of Helsco because he was the only person who could get the Whetton TRO dismissed. Simultaneously, Buick was negotiating with Henry Mixon, as an unauthorized representative of Helsco, to withdraw Buick's termination notice on Mixon's promise not to take Helsco into bankruptcy and give Buick time to recruit its favored dealer. Defendant sacrificed the legal integrity of its right of first refusal by using it as a tool to interfere with the contract between Helsco and Watson, withholding its consent and boosting Kent Peterson into the dealer chair by camouflaging the entire transaction in the guise of Project 2000.

The Third Circuit accurately states, "[T]here are legitimate reasons why a manufacturer would exercise its right of first refusal." *Crivilli,* at 390. While there is an obvious body of case law supporting the legitimate use of a right of first refusal there is, conversely, the illegitimate use the *Crivelli* court failed to even acknowledge.
The Third Circuit's view of an absolute contractual right of first refusal opens the door for a right of first refusal to be used for racial or gender discrimination or violate established standards of a trade of profession. Corporate solicitation and selection of its own choice to replace an existing dealer flies in the face of market economics and can

obviously exceed acceptable social and professional standards.

Further, there is a substantial body of law requiring that any justification asserted for interference with a contract, when exercised in bad faith, loses its privilege and the interference is not warranted. Determination of whether the interference is warranted is a question for the jury. *Alyeska Pipeline Service v. Aurora Air Service,* 604 P.2d 1090, at 1093(Ala. 1979).

The defendant quotes in its brief and the Third Circuit states

> Crivelli offers no explanation why the Pennsylvania legislature would turn away from the common law principle of freedom of contract and impose a reasonableness standard on aspects of a private contract between the manufacturer and dealer that, like the exercise of a right of first refusal, presents little, if any likelihood of harm to the dealer.

Id. at 392. Plaintiff herein is prepared to offer just such an explanation. There is no actual freedom of contract present in the Dealer Sales and Service Agreement. The bargaining position between General Motors and the individual dealer is so unequal that the legislature has to modify the freedom of contract in such a way as to more nearly equalize the relationship between the dealer and the factory. Under the statutory protections, the dealer can sell at an acceptable price if the buyer can meet threshold criteria applicable to all dealers. The statute exist to protect Utah businesses from adhesion contracts in the sole control of a corporation's vast legal department and the misuse of those provisions.

A prime example of a legislature willing to reject "freedom of contract" in exchange for a reasonableness standard is found in §320.643 of the Florida Statutes. Florida law prohibits the manufacturer from unreasonably withholding its consent and goes on to state as follows:

> For the purposes of this section, the refusal by the licensee to accept a proposed transferee who is of good moral character and who otherwise meets the written, reasonable, and uniformly applied standards or qualifications, if any, of the licensee relating to the business experience of executive management required by the licensee of its motor vehicle dealers is presumed to be unreasonable. If a licensee []receives such notice. . .The department shall determine, and enter an order providing, that the proposed transferee is either qualified or is not and cannot be qualified for specified reasons, or the order may provide the conditions under which a proposed transferee would be qualified. If the licensee fails to file such verified complaint within such 60-day period or if the department, after a hearing, dismisses the complaint or renders a decision other than one disqualifying the proposed transferee, the franchise agreement between the motor vehicle dealer and the licensee shall be deemed amended to incorporate such transfer or amended in accordance with the determination and order rendered, effective upon compliance by the proposed transferee with any conditions set forth in the determination or order.

Id. See entirety of §320.643 attached hereto as addendum "1." Although not specifically applicable to this matter, the State of Utah has amended Utah Code Ann. §13-14-201(1)(a)-(ee)(2000) since the acts in the case occurred. The amendments are instructive of the State of Utah's recognition that automobile manufacturers, including General Motors, present only adhesion contracts to their dealers and the dealers must

be protected by the state law. Specifically §13-14-201(1)(o) states

> (1) A franchisor may not in this state: . . .
> (o) fail to include in any franchise agreement the following language or language to the effect that: "If any provision in this agreement contravenes the laws or regulations of any state or other jurisdiction where this agreement is to be performed, or provided for by such laws or regulations, the provision is considered to be modified to conform to such laws or regulations, and all other terms and provisions shall remain in full force."

Id. The Third Circuit may consider such statutes as a rejection of the common law freedom of contract, but Utah does not. The Third Circuit failed to recognize that adhesion contracts prevent freedom of contract thereby requiring states to "interfere" by statutory provisions that provide some equity in the real effect of such contracts. The Third Circuit also fails to even consider the only real freedom of contract, the Buy and Sell agreement between the existing dealer and the purchaser, a contract where provisions are actually negotiable.

Defendant suggests that John Watson cannot avail himself of the "reasonableness" protection of the Utah statute because it only applies to the existing dealer. However, the statutory prohibition against the manufacturer unreasonably withholding its consent to accept the prospective purchaser only concerns the dealer where existing management or a family member is the buyer; otherwise only the prospective dealer is damaged by the refusal because the existing dealer will receive his contract price from the manufacturer in any event. No one but John Watson has a

greater interest in the outcome of the case because no one else was injured and an issue regarding an unreasonably withheld consent is unlikely to be raised by any other party including the existing dealer.

CONCLUSION

The trial court failed to recognize (1) that any justification, including a right of first refusal, is an affirmative defense that can be recognized only after a finding or admission of intentional interference; (2) the exercise of a right of first refusal made in bad faith cancels any qualification of a defense of privilege; (3) improper means and improper purpose, in combination or standing alone, are not defeated by a right of first refusal; (4) the Third Circuit's opinion in *Crivelli* ignores the adhesion aspects of franchise sales and service agreements specifically recognized in many statutes including Florida and Utah and assumes that Pennsylvania would legislate otherwise; and, (5) the right of first refusal can be exercised only consistent with and subject to public policy expressed in statutory provisions. Appellant concedes that they were remiss in relying upon other counsel in Pennsylvania and in failing to update verification of case law easily available to defendant as a party in other actions, before filing their initial brief and apologize to the court and counsel for that oversight. Regardless of plaintiff's oversight, courts should not hesitate to decide what is just and fair and morally sustainable in transactions where interference can be so easily manipulated under adhesion contracts and old statutes.

Respectfully submitted this 8th day of January, 2001.

BEAN & SMEDLEY

_____

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CERTIFICATE OF MAILING

I hereby certify that on this ____ day of _____, 2001, I mailed two (2) true and correct copy of the foregoing REPLY BRIEF OF APPELLANT and to the following postage prepaid:

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_____

ADDENDUM

Any other such opening or reopening shall constitute an additional motor vehicle dealer within the meaning of this section

History —s 9 ch 70-424 s 1 ch 70-439 s 3 ch 76-168 s 1 ch 77-457 ss 16 17 ch 80 217 ss 2 3 ch 81-318 ss 12 20 21 ch 88 395

[1]Note —Repealed effective October 1 1998 by s 21 ch 88-395 and scheduled for review pursuant to s 11 61

[1]320.643 Transfer, assignment, or sale of franchise agreements.—

(1) A motor vehicle dealer shall not transfer, assign, or sell a franchise agreement to another person unless the dealer first notifies the licensee of his decision to make such transfer, by written notice setting forth the prospective transferee s name address, financial qualification, and business experience during the previous 5 years The licensee shall, in writing within 60 days after receipt of such notice, inform the dealer either of his approval of the transfer, assignment, or sale or of the unacceptability of the proposed transferee, setting forth the material reasons for the rejection If the licensee does not so inform the dealer within the 60-day period, its approval of the proposed transfer is deemed granted No such transfer, assignment, or sale will be valid unless the transferee agrees in writing to comply with all requirements of the franchise then in effect Notwithstanding the terms of any franchise agreement, the acceptance by the licensee of the proposed transferee shall not be unreasonably withheld For the purposes of this section, the refusal by the licensee to accept a proposed transferee who is of good moral character and who otherwise meets the written, reasonable, and uniformly applied standards or qualifications, if any, of the licensee relating to the business experience of executive management required by the licensee of its motor vehicle dealers is presumed to be unreasonable A licensee who receives such notice may, within 60 days following such receipt file with the department a verified complaint for a determination that the proposed transferee is not a person qualified to be a transferee under this section The licensee has the burden of proof with respect to all issues raised by such verified complaint The department shall determine and enter an order providing that the proposed transferee is either qualified or is not and cannot be qualified for specified reasons, or the order may provide the conditions under which a proposed transferee would be qualified If the licensee fails to file such verified complaint within such 60-day period or if the department after a hearing dismisses the complaint or renders a decision other than one disqualifying the proposed transferee the franchise agreement between the motor vehicle dealer and the licensee shall be deemed amended to incorporate such transfer or amended in accordance with the determination and order rendered, effective upon compliance by the proposed transferee with any conditions set forth in the determination or order

(2)(a) Notwithstanding the terms of any franchise agreement, a licensee shall not, by contract or otherwise, fail or refuse to give effect to, prevent prohibit, or penalize or attempt to refuse to give effect to, prevent, prohibit, or penalize, any motor vehicle dealer or any proprietor, partner, stockholder, owner or other person who holds or otherwise owns an interest therein from selling, assigning, transferring, alienating, or otherwise disposing of, in whole or in part, the equity interest of any of them in such motor vehicle dealer to any other person or persons, including a corporation established or existing for the purpose of owning or holding the stock or ownership interests of other entities, unless the licensee proves at a hearing pursuant to this section that such sale, transfer, alienation, or other disposition is to a person who is not, or whose controlling executive management is not, of good moral character A motor vehicle dealer, or any proprietor, partner, stockholder, owner, or other person who holds or otherwise owns an interest in the motor vehicle dealer, who desires to sell, assign, transfer, alienate, or otherwise dispose of any interest in such motor vehicle dealer shall notify, or cause the proposed transferee to so notify, the licensee, in writing, of the identity and address of the proposed transferee A licensee who receives such notice may, within 60 days following such receipt, file with the department a verified complaint for a determination that the proposed transferee is not a person qualified to be a transferee under this section The licensee has the burden of proof with respect to all issues raised by such verified complaint The department shall determine, and enter an order providing, that the proposed transferee either is qualified or is not and cannot be qualified for specified reasons, or the order may provide the conditions under which a proposed transferee would be qualified If the licensee fails to file such verified complaint within such 60-day period or if the department, after a hearing dismisses the complaint or renders a decision other than one disqualifying the proposed transferee, the franchise agreement between the motor vehicle dealer and the licensee shall be deemed amended to incorporate such transfer or amended in accordance with the determination and order rendered, effective upon compliance by the proposed transferee with any conditions set forth in the determination or order

(b) During the pendency of any such hearing the franchise agreement of the motor vehicle dealer shall continue in effect in accordance with its terms The department shall expedite any determination requested under this section

History —s 7 ch 80-217 s 2 ch 81-318 s 8 ch 84-69 ss 13 20 21 ch 88-395

[1]Note —Repealed effective October 1 1998 by s 21 ch 88 395 and scheduled for review pursuant to s 11 61

[1]320.644 Change of executive management control; objection by licensee; procedure.—

(1) No licensee shall prohibit or prevent or attempt to prohibit or prevent, any motor vehicle dealer from changing the executive management control of the motor vehicle dealer unless the proposed change of executive management control of the motor vehicle dealer is to a person or persons not of good moral character or who do not meet the written, reasonable, and uniformly applied standards of the licensee relating to the business experience of executive management required by the licensee of its motor vehicle dealers A motor vehicle dealer who desires to change its executive management control shall notify the licensee by written notice, setting forth the name, address, and business experience of the proposed executive management A licensee who re